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IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

LARRY R. FAULKNER, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNIVERSITY OF TEXAS, *ET AL.*,

Petitioners,

v.

ROBERT BRISTER, *ET AL.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* AMERICAN COUNCIL ON EDUCATION IN SUPPORT OF PETITIONERS

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October 25, 2000

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QUESTION PRESENTED

Can university property, presumptively a nonpublic forum and declared nonpublic by the university, be deemed a public forum solely because it lies next to and looks similar to an acknowledged public forum?

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MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONERS

Petitioners have consented to the filing of this brief, by letter dated October 24, 2000. Respondent, however, has refused to grant consent. Pursuant to Supreme Court Rule 37.2(b), therefore, *amicus curiae* American Council On Education (ACE) respectfully moves for leave to file this brief in support of Petitioners in the above-captioned case.

ACE is a non-profit organization that represents approximately 1,800 public and private colleges and universities across the United States, as well as over 175 non-profit education associations and organizations. ACE's

principal purpose is to further the goals of higher education, including the interests of all parts of the academic community: students, faculty, administration, and employees.

ACE has a direct and immediate interest in any issue that affects the administration of public university campuses and facilities. The ruling below could have a significant impact on the ability of administrators at public colleges and universities to create and maintain a safe and tranquil environment for students that is conducive to learning. ACE and its member institutions thus have a keen interest in this case and its potential impact on the quality of education at state-run institutions of higher learning. Because of its intense focus on and concern for higher education nationwide, *amicus* respectfully submits that it offers the Court a perspective distinct from that of Petitioners, and that this brief will be of substantial assistance to the Court as it considers whether this case is of sufficient importance to warrant the Court's attention.

Accordingly, *amicus* requests leave to file the attached brief in support of Petitioners.

Respectfully submitted,

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The American Council on Education (ACE) is a non-profit organization that represents approximately 1,800 public and private colleges and universities across the United States, as well as over 175 non-profit education associations and organizations. ACE's principal purpose is to further the goals of higher education, including the interests of all parts of the academic community: students, faculty, administration, and employees.

ACE has a direct and immediate interest in any issue that affects the administration of public university campuses and facilities. The ruling below could have a significant impact on the ability of administrators at public colleges and universities to create and maintain a safe and tranquil environment for students that is conducive to learning. ACE and its member institutions thus have a keen interest in this case and its potential impact on the quality of education at state-run institutions of higher learning.[1]

STATEMENT OF THE CASE

The Erwin Center is a 17,000-seat indoor sports arena owned and operated by the University of Texas at Austin. The Erwin Center is the home court for the Texas Longhorns men's and women's basketball teams, it is host to commencement ceremonies and other official functions for the University of Texas, and it is the site of entertainment and cultural events for the University and the surrounding community. Pet. App. at B-6.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief. Although petitioners have consented to the filing of this brief, respondents have not, and *amicus* has therefore included a motion for leave to file pursuant to Supreme Court Rule 37.2(b).

The Erwin Center sits on property owned entirely by the University of Texas. The facility is bounded on all four sides by public streets, and the city of Austin owns an easement that extends on each side from the street curb to the point at which the University's property begins. The city's easement on each side serves as the city sidewalk, which, at any given point, ranges from 9 to 12 feet in width. The University's property begins where the city's sidewalk ends and includes all of the paved area from the city sidewalk to the base of the Erwin Center, as well as the arena itself. The paved area owned by the University of Texas – which extends right up to the public entrances to the building – is identical in appearance to the Austin city sidewalk adjacent to the University's property.

On the evening of January 19, 1996, the Austin Chamber of Commerce hosted a reception for the National Issues Convention at the Erwin Center. That same night, members of the Austin Greens, a local political party, distributed leaflets to guests as they arrived at the Erwin Center. Respondent Robert Brister, a member of the Austin Greens, distributed literature on the Red River Street side of the Erwin Center that night. As the District Court found, Brister "was moving around the entire paved area in front of the Red River doors and attempting to pass out his leaflets." *Id.* at B-2 - B-3. After being asked to move by University police officers, Brister was again found passing out leaflets "directly under the overhang in front of the Red River doors." *Id.* at B-3. The District Court also found that Brister "was impeding the delegates as they exited the buses." *Id.* at B-4. Brister's distribution of leaflets was found by the District Court to have "impede[d] the orderly ingress to the Erwin Center." *Id.* at B-11.

Brister and other members of the Austin Greens brought suit in federal district court alleging that University officials had violated their First Amendment rights. The District Court

entered a declaratory judgment that the university-owned grounds surrounding the Erwin Center are a "traditional public forum" for purposes of the First Amendment and that the University's ban on distribution of literature by non-students was unconstitutional. *Id.* at B-16. The District Court observed that there is no "physical demarcation to show where the [city's] easement ends and the University's property begins," and that, as a result, "[t]he entire paved area that runs along Red River Street, even though part of it is literally owned by the University, is a public sidewalk for First Amendment purposes." *Id.* at B-8 - B-9. Because, in the District Court's view, the Erwin Center grounds were a public forum, the District Court reasoned that the government may only regulate speech "if the restrictions are content neutral, narrowly tailored to serve a significant public interest, and leave open ample alternative channels of communication." *Id.* at B-8. The District Court nevertheless ruled that the University had not violated respondents' First Amendment rights."[b]ecause the plaintiffs were inhibiting the delegates' entrance into the Erwin Center." *Id.* at B-15.

The United States Court of Appeals for the Fifth Circuit affirmed the District Court on both counts. First, the Court of Appeals held that, because "there is no indication of physical demarcation of the public sidewalk, which is a public forum, and the university grounds, which typically are not," Pet. App. at A-9, the Erwin Center grounds are "for all constitutional purposes, indistinguishable from the Austin city sidewalk," and therefore a public forum. *Id.* at A-11. The Court of Appeals also found, however, that there was sufficient evidence in the record to affirm "the district court's ruling that plaintiffs suffered no violation of constitutional rights." *Id.* at A-15. Although the court below held that plaintiffs' constitutional rights had not been violated, the Fifth Circuit specifically noted that the District Court's ruling on the public forum issue was a

discrete declaratory judgment susceptible to appellate review without regard to the court's ultimate ruling on the reasonableness of the state's regulation of plaintiffs' speech. *See id.* at A-4 - A-7. Review by this Court of the "public forum" ruling is therefore appropriate in this case. *See Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 334 (1980).

REASONS FOR GRANTING THE WRIT

The Fifth Circuit's holding that university-owned property outside a major sporting arena is a "public forum" under the First Amendment – simply because it looks similar to a nearby city sidewalk – creates two important conflicts among the courts of appeals that require resolution by this Court. First, the Fifth Circuit (along with the Second Circuit) is irreconcilably in conflict with the Tenth and Third Circuits, which have held that the paths of ingress and egress into and out of theaters and arenas are not public forums. The approach taken by the Tenth and Third Circuits is clearly the correct one under this Court's precedents, and, had the public forum issue been decided in one of those jurisdictions, the result would have come out the opposite way.

Second, the Fifth Circuit (along with other circuits) is squarely in conflict with the Ninth and Eleventh Circuits over the significance of the physical characteristics of property in making the public forum determination. Under the ruling below, physical characteristics are given preeminent status in the public forum analysis, while the purpose and function of the property are not even considered. In the Ninth and Eleventh Circuits, in contrast, mere physical characteristics are not controlling, and those courts focus on the purpose and function of the property in question. Again, had the public forum issue been decided in one of those circuits instead of the Fifth Circuit, the result would have come out the other way.

Finally, *amicus* is particularly concerned about the Fifth Circuit's public forum analysis because it unnecessarily compromises the ability of university administrators to ensure a safe and secure environment for education by strictly limiting their ability to regulate conduct on their campuses. The fact that the Court of Appeals ultimately concluded that the University did not violate Respondents' constitutional rights is of little comfort to *amicus*, whose member organizations now face uncertainty in the extent of their authority to regulate campus life for the benefit of students. For all of these reasons, this Court should grant a writ of certiorari to resolve the conflicts and reverse the decision below.

I. THE CIRCUITS ARE IN CONFLICT OVER APPLICATION OF THE "PUBLIC FORUM" DOCTRINE.

A. Framework Of The Public Forum Doctrine.

Under this Court's jurisprudence, the first step in a First Amendment analysis is to determine the type of forum in which the speaker wishes to speak. "The Court has identified three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum." *Arkansas Educ. Tele. Comm'n v. Forbes*, 523 U.S. 666, 677 (1998). The amount of protection to which speech is entitled depends on which of these three fora is at issue. *See Cornelius v. NAACP Legal Defense and Educational Fund*, 473 U.S. 788, 800 (1985).

A traditional public forum is one, like a public sidewalk or park, which "'by long tradition or by government fiat,' . . . has been 'devoted to assembly and debate.'" *Forbes*, 523 U.S. at 677 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)). A designated public forum is one that is "created by government designation of a place or channel of communication for use by the public at large for

assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Cornelius*, 473 U.S. at 802. All other government properties are either nonpublic fora or not fora at all. *See Forbes*, 523 U.S. at 677.

The public forum receives the highest degree of protection under the Court's jurisprudence. "Speakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Cornelius*, 473 U.S. at 800. The government's ability to restrict speech in a designated public forum is similarly limited: "[r]egulation of such property is subject to the same limitations as that governing a traditional public forum." *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 678 (1992). The rule governing regulation of speech in a non-public forum is the least restrictive of the three. Indeed, "[l]imitations on expressive activity conducted on this last category of property must survive only a much more limited review. The challenged regulation need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view." *Id.* at 678-79. Given the dramatically different level of review that is applied to public forums versus non-public forums, the determination of forum type at the outset of the analysis is of critical importance to the outcome of each case.

B. The Circuits Are In Conflict Over Whether Arena Entryways Qualify As "Public Forums" Under The First Amendment.

The Fifth Circuit held below that the paved area outside the Erwin Center, including the grounds extending up to "the Center's public entrance," are a "public forum" for purposes of the First Amendment. Pet. App. at A-2. As the District Court acknowledged, the property held to be a public forum in this case includes the area "directly in front of the . . . doors" to the

arena. *Id.* at B-4. Consistent with the public forum holding below, the Second Circuit has also held that the "sidewalks and mall areas outside" of New York's Nassau Coliseum (home of the New York Islanders) are a public forum. *Paulsen v. County of Nassau*, 925 F.2d 65, 69, 71 (2d Cir. 1991). In reaching the same conclusion, the Second Circuit also expressly found what the Fifth Circuit implicitly decided below: "crowd control [and] safety . . . do not mandate a different result." *Id.* at 71.

In direct conflict with the Fifth Circuit and the Second Circuit, other circuits have rejected the proposition that public property dedicated to the ingress and egress of guests into and out of a major facility like the Erwin Center can be a traditional public forum under the First Amendment. For example, the Tenth Circuit has ruled that the Galleria in Denver is a non-public forum on the ground that "the Galleria's function is simply to permit ingress to and egress from the . . . various complexes" of the Denver Performing Arts Complex. *Hawkins v. City and County of Denver*, 170 F.3d 1281, 1287 (10th Cir. 1999). Like the area outside the Erwin Center, the Galleria "serves as the exclusive means of ingress to and egress from . . . events taking place in the adjacent performing arts complexes," and "in effect serve[s] as an extended lobby for the various performing arts venues." *Id.* at 1284. In the Tenth Circuit, a walkway that performs these functions is a non-public forum; in the Fifth and Second Circuits, identical property serving an identical function is a public forum. This is a direct conflict that should be resolved by this Court.

The Fifth Circuit's decision is also in direct conflict with the Third Circuit's decision in *International Soc'y for Krishna Consciousness v. New Jersey Sports and Exposition Authority*, 691 F.2d 155 (3d Cir. 1982) ("*ISKCON*"). In *ISKCON*, the Third Circuit held that the Meadowlands

complex in New Jersey (home of Giants Stadium and Meadowlands race track), including "the two structures and their surrounding areas," are "not a public forum." *Id.* at 158, 162. The court there reasoned that "[t]he Meadowlands complex does not fit any of the accepted descriptions of a public forum," and noted that "stadiums are the kind of public places described . . . as being 'so clearly dedicated to recreational use that talk of their use as a public forum would in general be totally unpersuasive.'" *Id.* at 161 n.3 (citation omitted); *see also Hubbard Broadcasting Inc. v. Metropolitan Sports Facilities Comm'n*, 797 F.2d 552, 555 (8th Cir.) (concluding that the Minneapolis Metrodome "does not come within the scope of the traditional public forum"), *cert. denied*, 479 U.S. 986 (1986). Moreover, the Third Circuit recognized that the state has a significant interest in "maintaining traffic and crowd control" at such facilities and that it is "essential that people move rapidly and with a minimum of interruptions as they stream through the parking lot and stadium." *ISKCON*, 691 F.2d at 162. Again, the outcome of the public forum issue in this case would be different had it been decided by the Third Circuit.[2]

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[2] Indeed, a district court in the Third Circuit applied *ISKCON* as recently as this year to conclude that university facilities and the areas immediately surrounding them are not public forums. *See Sabatini v. Reinstein*, No. Civ.A. 99-2393, 2000 WL 1052103 (E.D. Pa. July 21, 2000). In *Sabatini*, plaintiff asserted that his First Amendment rights had been violated when officials at Temple University law school in Philadelphia thwarted his efforts to "distribut[e] leaflets both inside and on the steps of the buildings where . . . graduation exercises were being held." *Id.* at *1. Relying on the Third Circuit's decision in *ISKCON* and this Court's decision in *United States v. Kokinda*, 497 U.S. 720 (1990), the District Court held that the "the buildings and outside steps adjacent to McGonigle Hall and the Apollo building do not qualify as traditional public forums." 2000 WL 1052103 at *2.

The Fifth Circuit and the Second Circuit have held that walkways surrounding and leading into a major arena are a public forum for purposes of the First Amendment – a proposition rejected by their sister circuits. *Amicus* respectfully submits that this is a direct and irreconcilable conflict on a significant question of federal law ripe for resolution by this Court.

C. The Circuits Are Split Over The Significance Of Physical Characteristics In Determining Whether Property Is A Public Forum.

The public forum ruling below also deepens a conflict among the circuits concerning the significance of the "physical characteristics" of property in the public forum analysis. Under the Fifth Circuit's analysis, the mere fact that university property "blends in with the city's sidewalks" renders the university property a public forum for First Amendment purposes. Pet. App. at A-2. Consistent with the Fifth Circuit's approach, the D.C. Circuit has acknowledged that public forum "cases generally focus on physical differentiations rather than on the scale of the area's various uses," and has held the sidewalks surrounding the Vietnam Memorial in Washington, D.C. to be a public forum based on their "apparent similarity" to the other sidewalks in Washington. *Henderson v. Lujan*, 964 F.2d 1179, 1182 (D.C. Cir. 1992). The Fourth Circuit has adopted a similar approach. *See Warren v. Fairfax County*, 196 F.3d 186, 203 (4th Cir. 1999) (Niemeyer, J., dissenting) (criticizing the Fourth Circuit for adopting a public forum analysis that "rel[ies] solely on the physical characteristics" of property).

The approach of the Fourth, Fifth, and D.C. Circuits is in direct conflict with that of the Ninth and Eleventh Circuits. Following this Court's decision in *United States v. Kokinda*, the Ninth Circuit has stated that "the '[m]ere physical characteristics of the property [do not] dictate forum analysis.'"

Jacobsen v. Bonine, 123 F.3d 1272, 1274 (9th Cir. 1997) (quoting *United States v. Kokinda*, 497 U.S. 720, 727 (1990) (plurality opinion)). As the Ninth Circuit explained, "it is the 'location and purpose' of the property and the government's subjective intent in having the property built and maintained, that is crucial for determining the nature of the property for forum analysis." *Id.* (citing *Kokinda*, 497 U.S. at 728-30).

Consistent with the Ninth Circuit, the Eleventh Circuit has echoed that "the mere physical characteristics of the property cannot dictate forum analysis." *Sentinel Communications Co. v. Watts*, 936 F.2d 1189, 1204 (11th Cir. 1991) (quoting *Kokinda*, 497 U.S. at 727). Like the Ninth Circuit, the Eleventh Circuit has rejected the notion – approved by the Fifth and D.C. Circuits – that "the superficial resemblance between" the property in question and a traditional public forum is central to the First Amendment analysis. That is all the more so, the Eleventh Circuit recognized, where, as here, there is evidence that "the government did not intend to open the forum to the same panoply of activity permitted in the latter fora." *Id.* Like the Ninth Circuit's decision in *Jacobsen*, the Eleventh Circuit's decision in *Sentinel Communications* directly conflicts with the public forum decision below, which conducted no analysis of the purpose and function of the grounds outside the Erwin Center.

Had the court below focused on the purpose and function of the grounds surrounding the Erwin Center – namely to ensure the orderly and safe passage of visitors into and out of the arena – rather than on the "mere physical characteristics" of the property, the Fifth Circuit's public forum determination would have come out the other way. This conflict – over whether the physical appearance of public property is to be given preeminence in forum analysis –

involves an important and unsettled question of constitutional law that should be resolved by this Court.

II. THE DECISION BELOW IMPROPERLY DEPRIVES OFFICIALS AT PUBLIC COLLEGES AND UNIVERSITIES OF A SIGNIFICANT AMOUNT OF CONTROL OVER THEIR CAMPUSES AND FACILITIES.

The decision below, if not reversed, could have a significant negative impact on the ability of public colleges and universities to ensure a safe and secure educational environment for their students. Prior to the lower court's ruling, a public university's property was deemed to be a non-public forum (at least with respect to non-students) unless the university took some steps to designate it as a public forum. This rule made sense, because it afforded university officials a measure of control over their campuses with the goal of ensuring an environment conducive to learning. Now, at least for public colleges and universities, property surrounding university facilities is far more likely to be declared a public forum – subject to the stringent rules for regulating speech in such a forum – whenever a university takes steps to blend its campus in with the surrounding environment.

The Supreme Court has long recognized that campuses at public colleges and universities are different from other public property. As the Court stated in *Widmar v. Vincent*, 454 U.S. 263 (1981),

> A university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that

> mission upon the use of its campus and facilities.

Id. at 268 n.5; *see also id.* at 278 (Stevens, J., concurring) (University "facilities are not open to the public in the same way that streets and parks are. University facilities – private or public – are maintained primarily for the benefit of the student body and faculty."). As the Ninth Circuit has recognized, a university "may preserve such tranquility as the facilities' central purpose requires. . . . Not only must a university have the power to foster an atmosphere and conditions in which its educational mission can be carried out, it also has a duty to protect its students by imposing reasonable regulations on the conduct of those who come onto campus." *Souders v. Lucero*, 196 F.3d 1040, 1045 (9th Cir. 1999) (internal citations omitted), *cert. denied*, 120 S. Ct. 1674 (2000).

The presumption that university grounds are a non-public forum serves important educational interests that were ignored by the court below. As this Court has recognized, university property is, first and foremost, dedicated to the mission of educating students. Students attending classes and other university events may now be subjected to leafletters, protesters, people soliciting donations, political supporters, and any other type of speaker as they attempt to enter university buildings. Students, moreover, are an easy target for people seeking to convey a message, since they have no choice but to visit designated buildings at predictable times in order to receive their education. The customary tranquility of the college environment – and the educational goals served by that environment – could thus be jeopardized by the ruling below.

The decision below leaves university administrators powerless to regulate this increased activity on their campuses absent a "compelling" or "significant" state interest. University officials must also now guess whether a regulation is sufficiently "narrowly drawn" to serve the state's compelling

interest, instead of simply satisfying the "reasonableness" test applied in non-public forums. Even if the university guesses correctly and draws a constitutionally permissible regulation, the university is still certain to be subjected to increased litigation and federal court review. The disruptive effect of the ruling below is apparent and, in the end, will only minimally promote First Amendment goals while potentially having a significant negative impact on education at public institutions.

The holding below is also not so limited as the Fifth Circuit suggests. The Erwin Center is typical of arenas at many major public universities. Like the Erwin Center, these arenas must accommodate thousands of individuals for university events, including sporting events and graduations, thus presenting school officials with the significant challenge of controlling large crowds and ensuring the safety and security of visitors. Moreover, the reasoning employed below is broad enough to apply to *any* university facility, not just arenas, and therefore could cause confusion on public school campuses regarding the level of regulation permitted outside campus buildings.

The design of the Erwin Center is also not as unique as the Fifth Circuit suggests. Many public colleges and universities, particularly in urban settings, make an effort to blend their facilities into the surrounding community. The price of such cooperation with the surrounding community under the ruling below is a dramatic loss of control over university property and the safety and security of students in and around university facilities. Surely the First Amendment does not require such a result.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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